

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10687

EDWARD W. PATALAS, APPELLANT

v.

UNITED STATES, APPELLEE

314

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

GEORGE MORRIS FAY,

United States Attorney.

RAYMOND E. BAKER,

JOSEPH M. HOWARD,

JEROME POWELL,

Assistant United States Attorneys.

United States Court of Appeals

For the
District of Columbia Circuit

FILED SEP 9 1960

Joseph W. Stewart

CLERK

STATEMENT OF QUESTIONS PRESENTED

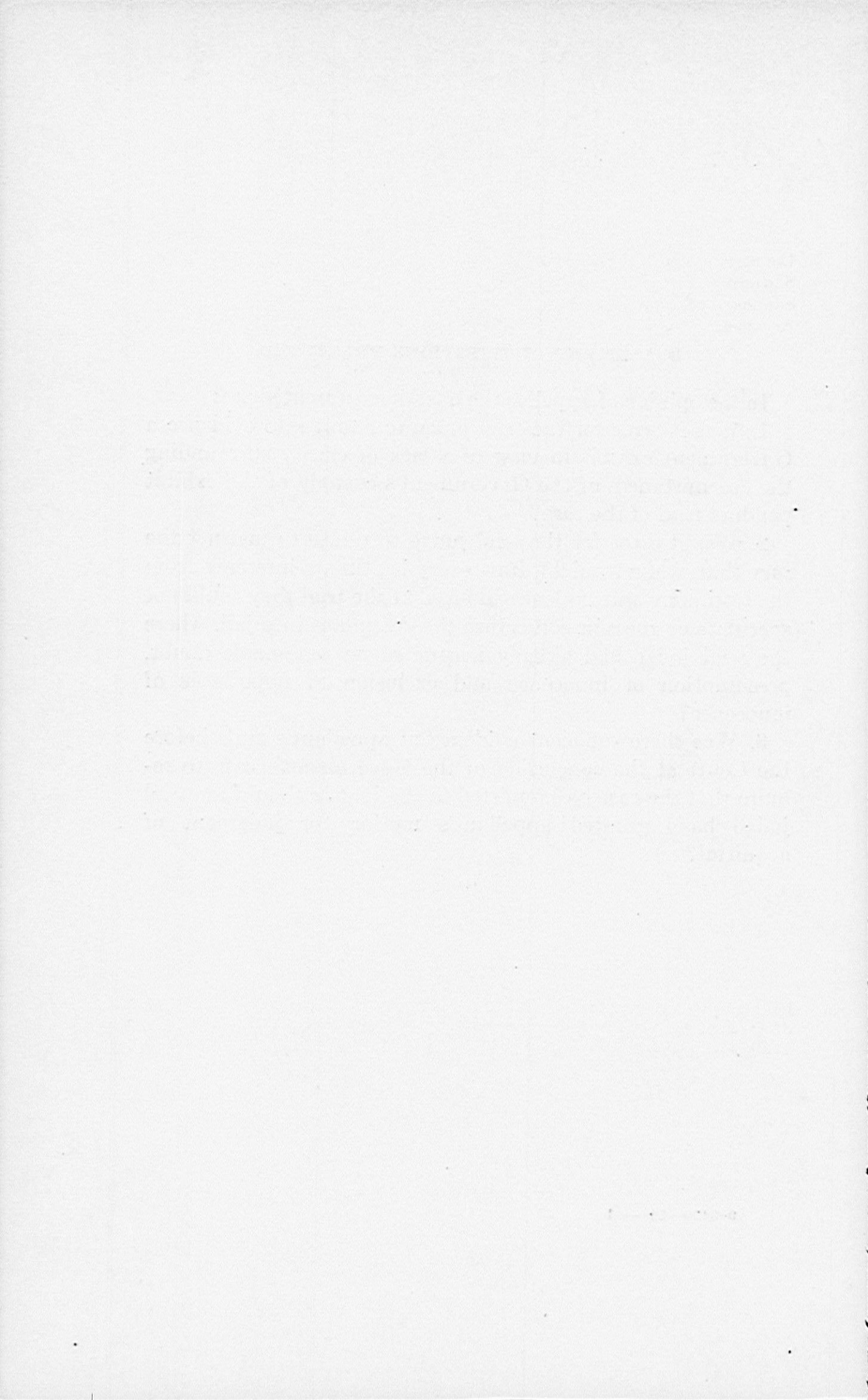
In the opinion of appellee the questions presented are:

1. Was it error for the trial judge to admit into evidence a Government exhibit in view of a lack of clarity surrounding the circumstances of the Government's custody of the exhibit pending trial of the case?

2. Was it error for the trial judge to refuse to instruct the jury that, while it might draw every legitimate inference from the testimony and evidence adduced at the trial they could not speculate or guess or conjecture the defendant into jail, where the trial judge had already instructed on reasonable doubt, presumption of innocence and exclusion of hypothesis of innocence?

3. Was there sufficient evidence of appellant's guilt before the Court at the conclusion of the Government's case to require that the case be submitted to the jury or should the trial judge have granted appellant's motion for judgment of acquittal?

(1)



INDEX

	Page
Counterstatement of case.....	1
Statutes.....	4
Summary of argument.....	4
Argument:	
I. Continuity of possession of Government exhibit 2 was sufficiently shown to warrant its admission in evidence....	5
II. Appellant's requested instruction was properly refused by the trial judge because the subject of the request had been covered by the instruction already given on reasonable doubt.....	9
III. The Government's evidence was sufficient to take the case to the jury. Consequently, appellant's motion for judgment of acquittal was properly denied.....	11
Conclusion.....	14

TABLE OF CASES

<i>Aldridge v. United States</i> , 61 App. D. C. 103.....	10
<i>Baer v. United States</i> , 54 App. D. C. 24.....	10
<i>Chin Gum v. United States</i> , 149 F. 2d 575.....	7, 8
<i>Cromer v. United States</i> , 78 U. S. App. D. C. 400 (1944).....	6, 7, 8
<i>Curley v. United States</i> , 81 U. S. App. D. C. 389.....	10, 11, 13, 14
<i>Dufour v. United States</i> , 37 App. D. C. 497.....	10
<i>Harris v. United States</i> , 8 App. D. C. 20.....	10
<i>Ledford v. United States</i> , 155 F. 2d 574.....	8
<i>McCartney v. Holmquist</i> , 70 App. D. C. 334.....	10
<i>Shewitz v. United States</i> , 293 Fed. 581.....	6
<i>Tomlinson v. United States</i> , 68 App. D. C. 106.....	10
<i>United States v. Marks</i> , 32 F. Supp. 459.....	8
<i>United States v. J. B. Penick & Co.</i> , 136 F. 2d 413.....	6, 7
<i>Villaroman v. United States</i> , — U. S. App. D. C. —, No. 10,469, decided July 24, 1950.....	9

TEXTS AND TREATISES

53 Am. J., Trial, § 527.....	10
32 C. J. S., Evidence, § 607.....	6
2 Wharton, Criminal Evidence, 11th Ed., § 757.....	6

JOINT APPENDIX

INDEX

	Page
Testimony of Witnesses:	
Jacob S. Farmer	17
Carmen Longo	18
John Foster	23
Hayes L. Berger	24
Motion for Acquittal	26
Charge to Jury	27
Verdict	31

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,687

EDWARD W. PATALAS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant Edward W. Patalas was tried by jury, in the United States District Court for this jurisdiction, and convicted of the crime of unauthorized use of a motor vehicle. D. C. Code (1940) § 22-2204. Pursuant to the jury's verdict, judgment of guilty was entered by the trial judge and sentence of from one to three years in jail was imposed on appellant. From that judgment and sentence this appeal is taken.

At the trial in the District Court the Government's case rested on the testimony of four witnesses.

The first witness, Jacob S. Farmer, testified that he was the owner of the automobile allegedly used by appellant and that on April 5, 1950, at about 2:00 A. M., he had parked the car in question in the 600 block of H Street NW. Farmer further testified that when he returned to the place where he had parked his car, approximately 15 minutes later, he found that the car was gone. He immediately notified the police. Mr.

Farmer stated that a short time later he went in company with a police officer to 7th and K Streets NW., where he saw his car astride a streetcar platform. The car had been considerably damaged. Lastly, Mr. Farmer testified that he had given no one permission to use his car on the night in question (Jt. App. 17-18).

The Government's second witness was Carmen Longo, a Metropolitan Police Officer assigned to #1 Precinct. Officer Longo stated that on the night of April 5, 1950, while on duty at approximately 2:15 A. M. to 2:25 A. M. he observed an unknown man, later identified as appellant, emerging from an alley in the 600 block of I Street NW. Appellant was staggering and had a laceration on his forehead. Officer Longo placed appellant under arrest apparently in the belief that appellant was drunk. Shortly afterward the officer received a call over his radio which caused him to proceed to 7th and K Streets NW., with appellant where Mr. Farmer's car was found astride the streetcar platform. Appellant denied ever having been in the car in question. Officer Longo then took appellant to Gallinger Hospital for treatment of the laceration to appellant's forehead. At the hospital, Officer Longo observed a pair of spectacles in appellant's coat pocket. These the officer removed and found that one lens was broken and that part of the glass from the broken lens was missing (Jt. App. 19-20). At this point in Officer Longo's testimony the Government offered the above-mentioned spectacles in evidence. They were admitted without objection, the Court remarking, *sua sponte*, that counsel for the defense might move to strike if the Government failed to link the spectacles up properly with the remainder of the case (Jt. App. 20). Several small pieces of glass were then shown to the witness by Government counsel. The witness stated that he had found these pieces of glass in Mr. Farmer's automobile, beneath the steering wheel between the clutch and brake pedals (Jt. App. 20). In answer to a question posed by defense counsel the witness stated that he recognized the pieces of glass as those which he had removed from the automobile, solely by reason of their shape (Jt. App. 20). In response to further questions by the Court and counsel for both sides Officer Longo testified that he had per-

sonally delivered the pieces of glass to the Property Clerk of the Metropolitan Police Department and that they had been turned over to Government counsel shortly before the trial (Jt. App. 20). At this point the prosecutor offered the pieces of glass in evidence, defense counsel objected, and the Court sustained the objection, stating that the Property Clerk, to whom Officer Longo had handed the evidence, should have been in court to testify to that fact (Jt. App. 21). After a colloquy at the bench between the Court and counsel, however, the court decided to admit the pieces of glass into evidence with the proviso that defense counsel might move to strike at a later time if continuity of possession was not properly established (Jt. App. 21).

Officer Longo was then asked to fit the pieces of glass into the spectacles taken from appellant. This he did in the view of the jury (Jt. App. 22). Defense counsel then cross-examined Officer Longo and the Government called its third witness, John Foster, a Metropolitan Police Officer assigned to the Property Clerk's Office.

Officer Foster testified only that he had that day received an envelope containing the Government's exhibits in the case on trial from Officer Mower, also of the Property Clerk's Office, and had delivered it to the prosecutor a few minutes before the trial commenced (Jt. App. 23-24).

The Government's last witness was Hayes A. Berger, also a Metropolitan Police Officer assigned to the Property Clerk's Office. Officer Berger testified that he was the person to whom the Government's physical evidence had been delivered for safekeeping prior to trial. Officer Berger stated that he had received the evidence, he thought, from Officer Gaylor of No. 1 Precinct and had had it in his custody until the date of trial. Officer Berger further stated that he had never, to the best of his recollection, seen Officer Longo, the Government's second witness (R. 43).

After defense counsel had cross-examined Officer Berger the prosecutor again offered the pieces of glass in evidence and defense counsel reviewed his objection to their admission. The Court overruled the defense's objection stating that the Government had made a prima facie showing of continuity of

possession in view of Officer Longo's positive testimony that he had given the exhibits to the Property Clerk and the inability of the Property Clerk, Officer Berger, to remember exactly who had given them to him (Jt. App. 26).

In that posture of the case, the Government rested, defense moved for a directed verdict of acquittal, which was denied, and the defense also rested, without producing any evidence. Counsel for both sides then argued to the jury, the Court gave its instructions, and the jury returned in four minutes with a verdict of guilty as charged.

STATUTE INVOLVED

Section 22-2204, D. C. Code (1940).

UNAUTHORIZED USE OF VEHICLES

Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment. (Feb. 3, 1913, 37 Stat. 656, ch. 23, § 826b.)

SUMMARY OF ARGUMENT

I

Continuity of possession of the Government's Exhibits Nos. 1 and 2, the spectacles and pieces of glass, was sufficiently shown to permit the admission of those exhibits in evidence.

II

The Court had instructed the jury thoroughly and carefully on the doctrine of "reasonable doubt." Therefore, it would have been duplicitous of the Court's charge to give the instruc-

tion requested by appellant to the effect that while the jury could draw every legitimate inference from the evidence it could not speculate or guess or conjecture the defendant into jail.

III

Under the rule announced in *Curley v. United States*, 81 U. S. App. D. C. 389 (1947) the trial judge properly denied appellant's motion for judgment of acquittal made at the conclusion of the Government's case.

ARGUMENT

I

Continuity of possession of Government exhibit 2 was sufficiently shown to warrant its admission in evidence

Officer Longo, the arresting officer and the person who removed the spectacles from appellant's pocket and found the pieces of glass in Farmer's car, testified that he personally delivered the spectacles and the pieces of glass to the Property Clerk's Office (Jt. App. 20). Officer Longo did not identify the member of that office to whom the evidence was handed. Officer Berger testified that he was the officer who accepted custody of the evidence for the Property Clerk's Office. Officer Berger thought that the property had been turned over to him by Officer Gaylor of No. 1 Precinct but he was not sure (Jt. App. 25-26). Officer Longo's name appeared on the envelope which contained the evidence. On the basis of the foregoing testimony the exhibits were admitted in evidence, the court stating that a prima facie case of continuity of possession was made out in view of Officer Longo's positive testimony that he had personally delivered the exhibits to the Property Clerk's Office and Officer Berger's inability to remember exactly who had given them to him (Jt. App. 26).

The Court's action in admitting the Government's exhibits in evidence at this time was entirely proper. Proof of continuity of possession of real evidence from the date of its acquisition by the party offering it in court until the date of trial has a

twofold purpose; first, to show that the article proffered is the same one, or part of the same one, that it is alleged to be, and second, to show that it is in substantially the same condition as at the time of its original acquisition. 32 C. J. S., Evidence, § 607; 2 Wharton, Criminal Evidence, 11th Ed., § 757.

In the instant case Government's Exhibit #1, the spectacles, was admitted in evidence without objection and no question of its identification was ever raised during the course of the trial below. The entire dispute centered about the pieces of glass finally admitted as Government's Exhibit #2. The pieces of glass were identified as well as was possible in view of their nature. Officer Longo testified that he recognized them as the ones found by him in Mr. Farmer's car by their shape. And Officer Longo stated that, at the time he found the pieces of glass in the car they fit the spectacles taken from appellant. The pieces of glass admitted in evidence also fit those spectacles. This was sufficient identification, for an article of real evidence may be admitted even though not perfectly identified. *Shewitz v. United States*, 293 Fed. 581 (C. C. A. 6, 1923).

It then became necessary for the Government to show that the pieces of glass were in substantially the same condition as they had been at the time that they had come into the Government's possession. However, it was not incumbent on the Government to exclude all possibility that the exhibit had been tampered with. It was sufficient to show that in reasonable probability it had not been changed in important respects. *United States v. Penick & Co.*, 136 F. 2d 413 (C. C. A. 2, 1943); 32 C. J. S., Evidence, § 607. The exhibit was admissible if in the trial court's opinion it would assist, and not mislead, the jury in understanding the matter before them. 2 Wharton, Criminal Evidence, 11th Ed., § 757.

In *Cromer v. United States* 78 U. S. App. D. C. 400 (1944) this Court was faced with a situation substantially similar to the one in the instant case. The *Cromer* case involved a criminal prosecution for violation of the Harrison Narcotic Act and there, as here, one of the appellant's assignments of error had to do with continuity of possession of the Government's real evidence. The Court said in disposing of that issue:

The second ground for reversal is based on failure to show sufficient continuity of possession in the agents of the Government, from the time that the drugs were seized to their introduction at the trial, to properly identify them. The alleged error is based on some confusion in the testimony as to which agent handed the envelope containing the drugs to the chemist to testify about them. The record, however, raises no suspicion that the evidence had been tampered with or that anyone other than a Government agent, with proper authority, ever had possession. The evidence was sufficient to identify the drugs.

In the case at bar the exhibits were at all times prior to trial in the custody of the Metropolitan Police Department. This was an important factor for the trial judge to consider in determining the admissibility vel non of the exhibits. *Cromer v. United States*, *supra*. To the same effect as the *Cromer* case is *United States v. Penick & Co.*, *supra*, in which it was said:

* * * In reaching his (the trial judge's) conclusion (as to the admissibility of certain real evidence), he must be guided by the nature of the article, circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.

In the instant case there was little chance of any unauthorized person tampering with the evidence in question, for it was at all times in the possession of the Police Department and the circumstances surrounding its preservation and custody were the normal ones in reference to exhibits of this type. That no showing in addition to this was required of the Government is shown by the holding in *Chin Gum v. United States*, 149 F. 2d 575 (C. C. A. 1, 1945). That was a criminal prosecution for the illegal sale of smoking opium in which the Government was unable to prove full continuity of possession in regard to the opium seized from the defendant's person. In disposing of an assignment of error based on the allegedly improper reception of the opium into evidence the Court of Appeals said:

* * * The fact that there is no positive evidence as to the whereabouts of the can (of opium) from the time the chemist analyzed its contents to the time of trial is of no consequence. In the absence of suspicious circumstances it is enough that there is evidence that the can produced by the Government at the trial came into the Government's possession before the trial.

And see *Cromer v. United States*, *supra*.

Here, as in the *Chin Gum* and *Cromer* cases, no suspicious circumstances surround the custody of the Government's evidence. At most, the testimony adduced at the trial reveals only a certain confusion as to the exact way in which the pieces of glass from the broken lens passed from Officer Longo to Officer Berger. Such a showing was not a sufficient ground to exclude the exhibits from evidence. *Chin Gum v. United States*, *supra*, *Cromer v. United States*, *supra*. And see *Tedford v. United States*, 155 F. 2d 574 (C. C. A. 6, 1946).

In conclusion, it may be well to point out that the only way in which the exhibits could have been altered would have been through the wrongful act of some member of the Police Department, presumably Officer Longo who had made the arrest and so might be said to have an interest in a successful prosecution of the case. Officer Longo, however, cannot be presumed to have acted improperly. In *United States v. Marks*, 32 F. Supp. 459 (D. C. D. Conn., 1940) a criminal prosecution for illegal possession of heroin, the Government was again unable to establish full continuity of possession of the heroin seized from the defendant because of the death prior to trial of one of the police officers who had had custody of the heroin. The Court stated that in order to hold the heroin inadmissible it would have to assume that the dead police officer had not performed his duty properly, whereas there was in law a presumption that public officers do discharge their duty properly, citing cases.

From the foregoing it is respectfully submitted that the trial judge committed no error in admitting Government's Exhibit #2, the broken pieces of glass, in evidence.

II

Appellant's requested instruction was properly refused by the trial judge because the subject of the request had been covered by the instruction already given on reasonable doubt

At the trial of this case appellant made no objection to the charge actually given to the jury by the trial judge. At the conclusion of the Court's charge appellant requested that an additional instruction be given but did not even suggest that he was dissatisfied with the remainder of the charge as given (Jt. App. 30-31). Despite that fact, appellant devotes a considerable portion of his argument in support of his second assignment of error to an attack on the trial judge's charge as given (Br. 12-15), stating however (Br. 15), that he "does not bring error, he is not now tardily raising his objection." Appellant is precluded from attacking at this time any portion of the charge to the jury to which he did not make objection in the trial court prior to the time when the jury retired. *Villaroman v. United States*, — U. S. App. D. C. —, No. 10,469, decided July 24, 1950; Rule 30, Federal Rules of Criminal Procedure. Consequently, the sole issue presented by appellant's second assignment of error is whether or not the trial judge acted properly in refusing to give the additional instruction to the jury requested by appellant. The instruction requested by appellant was couched in the following terms (Jt. App. 30):

Will the Court instruct the jury that while they may draw every legitimate inference, they may not speculate or guess or conjecture?

Appellant's request was refused by the trial judge on the ground that it would be duplicitous of the charge already given (Jt. App. 31).

Appellant concedes (Appellant's Brief, p. 13) that the trial judge instructed "adequately" on the subjects of presumption of innocence, reasonable doubt and exclusion of hypothesis of innocence. But, appellant argues, due to what he terms the "tenuous" nature of the evidence against him, he was entitled to the additional instruction set out above.

However, it is the rule of universal application that there is no error in refusing a requested instruction where the subject of the request has been covered by an instruction already given by the court. 53 Am. J., Trial S. 527. As early as the decision in *Harris v. United States*, 8 App. D. C. 20 (1896) this Court had occasion to examine this exact question and it there stated the general rule for this jurisdiction: (p. 24)

It is sufficient to say that, in our opinion, as we have already said, two of these three (requested) instructions are mere elaborations or variations of the instructions that were granted upon the subject of reasonable doubt; and that inasmuch as the instructions that were granted fully stated the law upon the subject, it would have been not only useless and unnecessary but even improper, to have granted the others, inasmuch as their only tendency would have been to confuse and therefore mislead the jury * * *

Since the decision of the *Harris* case, *supra*, the question here in issue has often been raised but the rule of the *Harris* case has never been departed from. *Dufour v. United States*, 37 App. D. C. 497 (1911); *Baer v. United States*, 54 App. D. C. 24 (1923); *Tomlinson v. United States*, 68 App. D. C. 106 (1937); *Aldridge v. United States*, 61 App. D. C. 103 (1932); *McCartney v. Holmquist*, 70 App. D. C. 334 (1934).

Applying the general rule set out above to the facts of the case at bar it seems evident that the additional instruction requested by appellant amounted to no more than a restatement of the instruction already given to the effect that the burden was on the Government to show appellant's guilt beyond a reasonable doubt. For, obviously, the jury could not give appellant the benefit of any reasonable doubt that it might have as to his innocence and still "speculate or guess or conjecture" him into jail. This Court has itself recognized the fact that the resolution of reasonable doubts in a defendant's favor forecloses the possibility of speculation or conjecture on the jury's part. In *Curley v. United States*, 81 U. S. App. D. C. 389 (1947), speaking of the dual functions of judge and jury in criminal cases, the Court said (at p. 392):

* * * It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon, pure speculation or from passion, prejudice, or sympathy. The critical point of this boundary is the existence or nonexistence of a reasonable doubt as to guilt.

It follows from the foregoing that the trial judge acted correctly when he declined to give the instruction requested by appellant stating that it would be duplicitous of his charge.

III

The Government's evidence was sufficient to take the case to the jury. Consequently, appellant's motion for judgment of acquittal was properly denied

In *Curley v. United States*, 81 U. S. App. D. C. 389 (1947) this Court set forth the criteria which should govern the decision of a trial judge in this jurisdiction in considering a motion for judgment of acquittal under Rule 29 (a), Federal Rules of Criminal Procedure. Because of the preciseness of the rule of the *Curley* case, it may be well to quote here at some length the exact language of the Court on the point here in issue. 81 U. S. App. D. C. 392, 393:

The functions of the jury include the determination of the credibility of witnesses, the weighing of evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or nonexistence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable

doubt or might fairly not have one, the case is for the jury and the decision is for the jurors to make. The law recognizes that the scope of a reasonable mind is broad. Its conclusion is not always a point certain but, upon given evidence, may be one of a number of conclusions. Both innocence and guilt beyond reasonable doubt may be fairly within the limits of reasonable conclusion from given facts. The judge's function is exhausted when he determines that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind.

The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know of no way to avoid that difficulty.

And later at p. 393:

* * * Our whole discussion centers about the function of determining reasonable doubt vel non. We hold that it is the jury's function, provided the evidence is such as to permit a reasonable mind fairly to reach either of the two conclusions * * *

Appellant maintains that a correct reading of the *Curley* case would have compelled the trial judge to grant appellant's motion for judgment of acquittal made at the close of the Government's case below. The motion should have been granted if there was "no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *Curley v. United States*, at p. 393, *supra*.

The following facts from which appellant's guilt could reasonably be inferred were before the jury:

Appellant was arrested sometime between 2:15 and 2:25 A. M. approximately two blocks from the place where Mr. Farmer's car had been wrecked. Mr. Farmer had parked his car approximately three blocks from the scene of the accident at about 2:00 A. M. The elements of time and place were strongly corroborative of the Government's theory of the case.

Appellant had a slight laceration on his forehead and appeared to be in a semidazed condition at the time of his arrest. These facts also lent support to the Government's case.

Officer Longo, the arresting officer, took appellant to the place where Mr. Farmer's wrecked car was and questioned appellant about the car. Appellant denied having ever been in the car and denied all knowledge of its taking. Shortly thereafter, at Gallinger Hospital, Officer Longo removed from appellant's pocket certain spectacles from which one lens had been broken. Officer Longo went immediately to the police impounding lot, to which Mr. Farmer's automobile had meanwhile been removed, and found on the floor of the car, between the brake and clutch pedals, certain small pieces of glass. These pieces of glass he fitted into the spectacles taken from appellant and he found that they fit "like a jig-saw puzzle." (This experiment was again performed in the presence of the judge and jury, apparently with the same result.)

Certainly, the foregoing evidence, particularly the unexplained presence in Mr. Farmer's automobile of the pieces of the lens from appellant's spectacles, was sufficiently strong to enable a reasonable mind fairly to conclude that appellant was guilty beyond a reasonable doubt. *Curley v. United States*, *supra*. Or, to state the matter in another way, it could not be said that there was "no evidence upon which a reasonable

mind might fairly conclude guilt beyond a reasonable doubt." *Curley v. United States*, at p. 393.

It follows that appellant's motion for judgment of acquittal was properly denied.

CONCLUSION

It is respectfully submitted that no prejudicial error was committed in the trial of appellant's case in the District Court and the judgment of that Court, should, therefore, be affirmed.

GEORGE MORRIS FAY,
United States Attorney.

RAYMOND E. BAKER,

JOSEPH M. HOWARD,

JEROME POWELL,

Assistant United States Attorneys.

JOINT APPENDIX

(15)

* * * * *

JACOB S. FARMER

* * * * *

Direct examination by Mr. BAKER:

* * * * *

Q. And you live where?

A. 212 Wayne Place Southeast.

* * * * *

Q. Do you know where that car was in the early morning hours of April 5, 1950?

A. Yes.

Q. Where was it, sir?

A. 600 block of H Street Northwest.

Q. Was it parked?

A. Yes.

Q. And when did you park it, sir?

A. Approximately 2 a. m.

Q. Did you leave the keys in the car, sir?

A. I had two sets of keys.

Q. Just where was the car parked?

A. 600 block of H Street.

Q. Did you leave the keys in the car, sir?

A. Yes, sir.

Q. You said something about you had two sets of keys.

A. Yes. I was under the impression—I had clothes in the car, a suit and a top coat, and I went in the Chinatown restaurant for coffee late in the morning, on the way home, and I had two sets of keys, and one I left in my coat pocket, presumably, and the other one I had in my pocket.

Q. Which set of keys had you used to operate the car with?

A. Both sets.

Q. I mean at that particular time you parked it.

A. I used the ones in my pocket.

Q. Had you locked the car when you got out?

A. I thought I did. Evidently it was not locked completely.

Q. Did there come a time when you looked for your car again?

A. Yes; just a short time later, in approximately fifteen minutes I came out, and it was gone.

Q. What did you do then, sir?

A. I phoned the Police Department.

Q. Did there come a time when you saw your car again?

A. Yes. A few moments later the detectives came down and picked me up and took me around the corner several blocks away and it was on top of a streetcar platform.

Q. Where was that? Do you know?

A. Seventh and K.

Q. Did you identify your car?

A. Yes.

Q. Had the car been injured or damaged in any way?

A. Yes.

* * * * *

Q. Do you know the defendant Edward W. Patalas?

A. No.

Q. To your knowledge, on April 5 had you ever seen him prior to that day?

A. No.

* * * * *

Q. Did you give him permission to use this car, sir?

A. No.

* * * * *

CARMEN LONGO

* * * * *

DIRECT EXAMINATION

* * * * *

* * * We had—previous to that—we had been pulling in on the box on the hour, and we received this call, coming west on I Street, in the 600 block, and observed this gentleman coming out of an alley, and he was sort of wavering on his feet and had a laceration in the center of his forehead.

* * * * *

The WITNESS. Well, we arrested the defendant Edward Patalas, and proceeded to the scene where the car was setting on the platform.

By Mr. BAKER:

Q. What was the condition of the defendant at the time you arrested him?

A. Well, all I could say, he didn't appear drunk, and then again he did.

Q. What was his physical condition, sir?

A. Well, he had a laceration of the forehead and I say he was wavering on his feet. That is about all.

Q. You then took him to where the car was?

A. Yes.

Q. At Seventh and K?

A. Yes.

Q. Did you have a conversation with him about this automobile?

A. Asked him if he had been driving the car or was he in a car at any time, and he said "No."

* * * * *

Q. Where did you take him then, sir?

A. Took him to Gallinger Hospital.

Q. Did you go along with him?

A. Yes.

Q. Did you talk to him while he was being treated, or were you present while he was being treated?

A. Yes; I was present.

Q. Did you notice anything at that time, sir?

A. Well, at the time I noticed a pair of eyeglasses from his coat pocket.

Mr. BAKER. I will ask that these be marked for the purposes of identification.

(Pair of spectacles was marked "Government's Exhibit No. 1" for identification.)

By Mr. BAKER:

Q. I show you Government's Exhibit No. 1 for purposes of identification and ask you if you can tell us what these are and where you first saw them.

A. They are the eyeglasses taken from the coat pocket of the defendant at Gallinger Hospital.

Mr. BAKER. I will offer these in evidence, sir.

Mr. JONGBLOET. No objection.

The COURT. They may be admitted.

(Thereupon, Government's Exhibit No. 1 was received in evidence.)

* * * *

The COURT. You may move to strike it if they are not connected up, Mr. Jongbloet.

* * * *

By Mr. BAKER:

Q. I show you these pieces of glass and ask you if you have ever seen them before, sir.

A. Yes. Those are the three pieces of glass that I myself picked up in the interior of the car at the police lot by the brake and clutch pedal.

* * * *

Q. How do you recognize these pieces of glass, sir?

A. There is only one way. My partner and I both went to the car to pick them up. He was there to verify it, and we fitted them into the glass. They fit.

Mr. JONGBLOET. How do you recognize these?

The WITNESS. Well, they are just three pieces of eyeglass; that is the only way.

* * * *

The WITNESS. Well, they are just three shaped glasses, by the shapes is about the only way I can recognize them.

The COURT. Well, where were these pieces of glass between the time you picked them up and the time they were shown to you a moment ago?

The WITNESS. They were in the property clerk's custody.

The COURT. Now, to whom did you deliver those pieces of glass?

The WITNESS. Delivered them to the property clerk.

* * * *

The COURT. And did you receive them from the property clerk today?

The WITNESS. I received them from the Court Clerk, the Court Property Clerk. They were turned over to Mr. Baker.

* * * *

Mr. BAKER. I will offer these in evidence, sir.

Mr. JONGBLOET. I will object to them.

The COURT. Objection sustained.

You ought to have had the property clerk here to identify that these are the pieces of glass that were handed him by the officer.

* * * * *

The COURT. Whenever something is offered in evidence that was obtained by a police officer, like a narcotic in a narcotic case, for example, you always have to show continuity of possession. That is elementary.

You have not that proof of continuity of possession.

* * * * *

The COURT. Well, he can come back here for a few minutes. What is the importance of these pieces of glass?

Mr. BAKER. The only thing that placed the defendant positively in the automobile.

The COURT. How does it place the defendant in the automobile?

Mr. BAKER. Because the glasses can be shown to fit with the ones in his pocket, like a jigsaw puzzle. They fit perfectly.

* * * * *

The COURT. Well, that is all the more reason why you have to make technical proof unless that is waived.

Mr. BAKER. I will ask the Court for permission to accept the evidence pending testimony by the property clerk.

The COURT. No. What else are you going to have?

* * * * *

Q. Officer, when you state you picked up these pieces of glass, what did you do with them, sir?

A. Took them back to the station in front of the defendant and fitted them into the glasses.

Mr. JONGBLOET. Your Honor, I object to that, pending the other witness's testimony.

The COURT. I am going to admit this evidence, and if the continuity of possession is not established, I will entertain a motion to strike it.

* * * * *

By Mr. BAKER:

Q. I show you Government's Exhibit No. 1, sir, and ask you if that is the pair of glasses you testified that these fitted into.

A. They do.

Q. Would you show us how you did that, sir? [The exhibit was handed to the witness.]

A. I can't quite hold it [indicating]. This is one piece here. I will have to fit them in one at a time.

The COURT. Can the jury see this? Can all of you see it? Suppose you step down and show it to the jury.

(The witness stepped down before the jury to demonstrate the fitting of the pieces of glass into the spectacles.)

* * * *

The COURT. I would like to see the exhibit. I want to satisfy myself.

Mr. BAKER. Certainly.

* * * *

CROSS-EXAMINATION

* * * *

By Mr. JONGBLOET:

Q. Did you examine the steering wheel of the car for fingerprints?

A. No.

* * * *

Q. Did you check the car for blood?

A. I did, but—

Q. No blood?

A. Well, the steering wheel is a sort of a colored-tone, and I couldn't see any.

Q. Was it your hypothesis that he had struck his head against a part of the car when there was a collision?

* * * *

A. Well, I say it was my opinion that he had struck himself some place in the car.

Q. And you looked the car over for such a point of impact, did you?

A. I did.

Q. Did you find it?

A. Well, no; I couldn't find any point.

Q. Did you find any point that would suggest to you that the defendant might have struck that with his forehead?

A. He could have struck himself any number of places, steering wheel, sun visor, anywhere.

Q. Let me ask you one more question:

Can you fix the time exactly, at what time did you first see the defendant emerging from the alley?

A. I couldn't exactly fix the time, but I would say it was around 2:15, 2:25, in between that time.

* * * * *

JOHN FOSTER

* * * * *

DIRECT EXAMINATION

* * * * *

Q. And what is your occupation, sir?

A. I am property clerk, Police Department.

* * * * *

Q. I show you Government's Exhibit 1 and ask you if you can identify it, sir.

A. Yes. I brought that over this morning from the Metropolitan Police Department storeroom over here.

* * * * *

Q. How do you get it? When you got this from the Police Department, where was it in the Police Department?

A. It was in their storeroom. * * *

* * * * *

The COURT. No. You have to establish, Mr. Baker, that this envelope contained the pieces of glass that were delivered by Officer Longo to the property clerk.

Now, that is all that you have to establish.

* * * * *

What you have to do is to produce evidence that this envelope contained the pieces of glass that Officer Longo delivered to the property clerk.

* * * * *

The COURT. Mr. Foster, was this envelope in the custody of the property clerk?

The WITNESS. It was; yes, sir.

The COURT. And you brought it over this morning?

The WITNESS. Yes, sir.

The COURT. And to whom did you deliver it?

The WITNESS. I put it in the property room downstairs and delivered it to Mr. Baker about fifteen or twenty minutes ago.

* * * *

The COURT. This is, of course, rather technical, but I think in view of the fact that the point is raised, and in view of the importance of the evidence, I think the identification should be established, because it is about the only piece of evidence that the Government relies on.

* * * *

The COURT. Well, no doubt continuity can be established.

* * * *

The COURT. * * *

You know, I think you have got a weak case, Mr. Baker; very weak. Because if you had optical testimony that these pieces of glass would fit the same prescription, I think you would have a pretty strong case, but, for instance, I might break my glasses and somebody might pick the pieces up.

* * * *

Mr. BAKER. With the corroborating circumstances of the time and place, I felt we had enough information.

The COURT. There is not necessarily a corroborating circumstance, except that the fellow was in the neighborhood.

Mr. BAKER. Well, the fact that the car was in the accident and the fact that the man had an indication that something had happened to him, that he is in the neighborhood at an odd hour of the day, and with the broken glasses in his pocket.

* * * *

HAYES L. BERGER

* * * *

DIRECT EXAMINATION

* * * *

Q. What is your assignment, sir?

A. I am assigned to the chief clerk's office, property.

The COURT. Of the Police Department?

The WITNESS. That is right.

By Mr. BAKER:

Q. I hand you an envelope, sir, and ask you whether or not you can identify it.

A. Yes, sir. That is one of our property envelopes.

Q. Can you tell me where you first saw that envelope, sir?

A. In the office, in the room of 146, the Municipal Center.

Q. How did that get into your custody, sir?

A. It was brought to me by an officer of No. 1, along with the property return.

Q. Do you have the property return with you, sir?

A. I do, sir.

* * * * *

Q. What officer turned that over to you, sir?

A. I think it was Officer Gaylor.

* * * * *

The COURT. Well, ordinarily we do not have much trouble or difficulty about it, because the officer who identifies the exhibit on the witness stand, identifies it as being the exhibit that he turned over to the property clerk, but unfortunately here Officer Longo did not seem to be in a position to identify those as being the very same pieces of glass that he turned over.

Now, if he could identify them as the same pieces of glass that he turned over to the property clerk, why, that would be a different proposition.

Do I correctly understand the testimony, that he did not identify them as the same pieces?

Mr. BAKER. He said those looked like the same pieces.

The COURT. That is what I thought. Was this envelope turned over to you, Officer?

The WITNESS. Yes, sir.

The COURT. You personally?

The WITNESS. Yes, sir.

The WITNESS. [sic] By an officer from the first precinct?

The WITNESS. Yes, sir.

In this case I think it was Officer Gaylor, but I would not be positive, because the officer that collects the evidence some-

times turn that in himself, but Officer Gaylor, as a rule, turns in the evidence that is collected by various officers in the No. 1 precinct.

* * * * *

By Mr. BAKER:

Q. Was it in your custody then until very recently?

A. Yes, sir.

Mr. BAKER. I will offer the pieces of broken glass in evidence, sir.

Mr. JONGBLOET. I object.

The COURT. Objection overruled. I think there is a prima facie case of continuity of possession. Officer Longo's name is on the envelope, and Officer Longo testified that he delivered these pieces of glass to the property clerk. The property clerk cannot remember this, but Officer Longo's testimony is sufficient on that point, I think.

Mr. JONGBLOET. I know, but his testimony was that to the best of his recollection, Officer Gaylor delivered this.

The COURT. Well, he wasn't sure about that, and Officer Longo was quite certain in this case, whereas this gentleman probably receives any number of pieces of property, day in and day out, and he cannot naturally be expected to remember where every piece of property came from.

* * * * *

The COURT. * * *

Now, they have not got as satisfactory and as adequate proof, or as clear proof of continuity of possession, as one has a right to expect, but, however, it is sufficient, I think.

* * * * *

Mr. BAKER. Yes; the Government will rest.

Mr. JONGBLOET. I make a motion, sir, for a judgment of acquittal.

The COURT. Motion denied. I think it is clearly a case for the jury to determine whether the evidence of eyeglasses is sufficient.

* * * * *

CHARGE TO THE JURY

The COURT (Holtzoff, J.): Ladies and gentlemen of the jury, the defendant Edward W. Patalas is on trial before this Court on a charge of unauthorized use of an automobile. Specifically he is charged with operating without authority an automobile belonging to one Jacob S. Farmer, on or about the 5th day of April of this year.

It now becomes your duty to determine whether the defendant is guilty or not guilty of the offense with which he is charged.

It is my function and my duty to instruct the jury as to the law, and the jury must take the law from the Court.

But you ladies and gentlemen are the final judges of the facts and must determine the facts for yourselves on the evidence in this case.

The Court's discussion of the evidence is intended only to help you and is not binding on you.

First, the fact that the defendant has been indicted is not to be taken as an indication of guilt. Every defendant in a criminal case is presumed to be innocent. This presumption of innocence attaches to the defendant throughout the trial.

The burden of proof is on the Government to prove the defendant guilty beyond a reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that the defendant has committed every element of the offense charged, the jury must find him not guilty.

But the burden on the Government is to prove the defendant's guilt beyond a reasonable doubt, not beyond all doubt whatsoever. It means proof to a moral certainty, and not necessarily proof to an absolute or mathematical certainty.

By a reasonable doubt, as its name implies, is meant a doubt based on reason; a doubt for which you can give a reason to yourself and not just some whimsical speculation or some capricious conjecture.

Putting it another way, proof beyond a reasonable doubt is such proof as will result in an abiding conviction of the defendant's guilt on your part, such a conviction as you would

be willing to act upon in the more weighty and important matters which relate to your own affairs.

In determining whether the Government has established the charge against the defendant, you will consider and weigh the testimony of all the witnesses who have testified in this trial, as well as all the circumstances concerning which testimony has been given.

You and you alone are to determine whether to believe the witnesses or the extent to which they should be credited.

Now, as I said at the opening of my remarks, the defendant is charged with the unauthorized use of a motor vehicle. This offense is defined in the law of the District of Columbia as follows:

"Any person who, without the consent of the owner, shall take, use, operate, or remove from a garage, stable or other building, or from any place or locality on a public or private highway, an automobile or motor vehicle and operate or drive or cause the same to be operated or driven, for his own profit, use, or purpose, shall be punished by the penalty prescribed by the statute."

The elements of the offense are as follows:

First, that the motor vehicle in question was stolen. The testimony to that effect was given by the witness Jacob Farmer.

Second, that the defendant either took the vehicle or that he used or operated it.

Third, that at the time the defendant used, operated, or removed the vehicle, he knew that it was stolen.

In order to justify a verdict of guilty on a charge of unauthorized use of a motor vehicle, it is not necessary to show that the defendant himself stole the vehicle. It is sufficient to show that the defendant drove or used or was a passenger in the vehicle, knowing it to have been stolen.

Knowledge that the vehicle has been stolen ordinarily cannot be proven directly, because no one can see the operations of the mind of another human being; but knowledge may be inferred from circumstances; things that are done, things that are said, and the surrounding circumstances, as well as from the act itself.

I had occasion to tell some of you the other day that in criminal cases there are two types of evidence. One type is known as direct evidence and another type of evidence is known as circumstantial evidence. By direct evidence is meant evidence of eyewitnesses who saw the act perpetrated.

In this case there is no eyewitness who saw the defendant in this automobile, but there is a second type of evidence known to the law which is called circumstantial evidence. Circumstantial evidence consists of circumstances from which the defendant's guilt may be inferred by the jury.

Now, no one can say that the direct evidence is more reliable or stronger than circumstantial evidence, or that circumstantial evidence is more reliable than direct evidence. An eyewitness may make a mistake, for example, and circumstances too may lead to an erroneous inference.

On the other hand, at times if the circumstantial evidence is particularly strong, it may be even more convincing than direct evidence because circumstances speak for themselves and if they are strong enough, they may at times irresistibly lead to a definite conclusion.

The law permits conviction of a criminal offense on circumstantial evidence alone. If it were not for that rule, numerous crimes would go unpunished, because a person who commits a crime endeavors to commit it out of the presence of witnesses. That is natural.

But in order to justify a verdict of guilty on the basis of circumstantial evidence alone, the circumstantial evidence must be of such degree and character as not only to point to the defendant's guilt, but also to be inconsistent with the theory of the defendant's innocence.

It must be inconsistent with any other theory except the theory of the defendant's guilt.

If the circumstantial evidence is consistent with the defendant's guilt, but it is also consistent with the defendant's innocence, or in fact with any other theory except the theory of the defendant's guilt, then the defendant must be found not guilty.

Now, the evidence in this case consists of the following:

Shortly after the car was stolen, in the nighttime, it was found on a loading platform within a few blocks from the place where it was stolen. The defendant was seen coming out of a nearby alley with some scratches or lacerations or cuts on his head.

The car was searched and three pieces of glass, which appeared to be pieces of broken lenses from eyeglasses, were found on the floor of the car. In the defendant's pocket there was a pair of eyeglasses, or a pair of spectacles, with the lenses partially broken. The Government's contention is, and it offered evidence tending to show it, that the broken pieces of glass found on the floor of this stolen car fit exactly into the broken portions of the spectacles found in the defendant's pocket.

The Government seeks to draw the inference that these pieces of glass found on the floor of the car were part of the defendant's eyeglasses, and that therefore the defendant must have been in the car at the time that apparently the car met with some accident and landed on the loading platform.

Now, it is for you to determine what the fact is; whether the evidence is as the Government contends it to be, and also whether the inference that the Government seeks to draw should be drawn. It is for you to determine.

Of course, if you find that the defendant was in the car after it was stolen, some time after it was stolen, at the time of the accident, you have a right to infer that he knew it was stolen and therefore he was using the car without authority, and you may find the defendant guilty.

If you feel that this evidence is not sufficient to justify the inference, then your verdict should be not guilty.

As you are well aware, your verdict should be reached by a unanimous vote, and your verdict should be either guilty or not guilty.

* * * * *

Mr. JONGBLOET. Yes, your Honor. Will the Court instruct the jury that while they may draw every legitimate inference, they may not speculate or guess or conjecture?

The COURT. No; I do not think I shall add that. I think that is duplicity of my charge.

* * * * *

(Whereupon, at 3 o'clock p. m., the jury retired to deliberate of their verdict.)

VERDICT OF THE JURY

(The jury returned at 3: 05 o'clock p. m., with their verdict, as follows:)

* * * * *

The DEPUTY CLERK. What say you as to the defendant Edward W. Patalas?

The JURY FOREMAN. We find the defendant guilty.

* * * * *

The COURT. Ladies and gentlemen of the jury, the Court wishes to thank you for the time and attention you have given to this case. I think it is a very sensible verdict.

* * * * *